NO. 82212-3

SUPREME COURT OF THE STATE OF WASHINGTON

SOUTH TACOMA WAY, LLC, Plaintiff/Appellant below,

Respondent.

v.

STATE OF WASHINGTON, Defendant/Respondent below,

and

SUSTAINABLE URBAN DEVELOPMENT #1, LLC,
Defendant/Respondent below,

Petitioner,

SUPPLEMENTAL BRIEF OF STATE OF WASHINGTON

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I. ISSUE PRESENTED

RCW 47.12.063(2) provides the Washington State Department of Transportation (WSDOT) with authority to sell surplus property "under the jurisdiction of the department" to various governmental entities described in subsections (a) to (d) and to private parties including an "abutting private owner" under subsection (g). *See* Appendix. The statute provides for sale to an abutting private owner "only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale." RCW 47.12.063(2)(g). "If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283."

WSDOT sold a 5000 square foot alleyway to Sustainable Urban Development (Sustainable), an abutting owner. WSDOT, however, erred and did not give written notice of the right to purchase to one of the other abutting owners (Staub). Months after executing the deed to Sustainable and well after WSDOT told Staub of the sale, Staub assigned its rights relating to the lack of notice to South Tacoma Way, who bought the Staub property and brought this suit. The suit primarily contends the sale and

deed were void *ab initio* but, in essence, seeks an order rescinding the sale and deed. CP 4-8.

The first issue presented is whether the deed to the abutting owner, Sustainable, was valid or void *ab initio* under the ultra vires doctrine. *See* Sustainable Petition at 5, ¶ 4.4. As shown below, the action of WSDOT involved a failure to follow a procedural notice step and therefore the deed is not void *ab initio.* The Court should reject South Tacoma Way's primary theory that conveyance of the deed was a void act.

South Tacoma Way, however, has also argued that the deed should be invalidated or rescinded to vindicate the statutory requirement of notice to abutting owners. Thus, the second issue is whether an abutting owner (or its assignee) can obtain an order to invalidate or rescind a deed. To fulfill the purposes of the statute, any rescission must be limited to actions brought promptly after discovering that WSDOT failed to give notice. Here, South Tacoma Way did not act promptly after discovering the sale and lack of notice to Staub and its claim should not be allowed because it would, on the whole, frustrate the primary purpose of the surplus property statute.[1]

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[1] Sustainable and WSDOT also argued laches at the Court of Appeals. Respondents Br. at 47. South Tacoma Way's claim could be subject to laches because, in substance, it seeks an equitable remedy to rescind or invalidate the sale. The WSDOT does not believe the Court needs to address laches because it can conclude that any claim to invalidate the sale for failing to follow the statutory notice must be brought promptly.

II. STATUTORY BACKGROUND

In 1977, the legislature expanded WSDOT's authority to sell surplus property by specifically authorizing sales to a list of entities, both public and private, including "abutting private owners." Laws of 1977, Ex. Sess., ch. 151, §§47 and 48; RCW 47.12.063(2)(a)-(k). RCW 47.12.063(2)(g) addresses sales to abutting private owners:

> (2) Whenever the department determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for transportation purposes and that it is in the public interest to do so, the department may sell the property or exchange it in full or part consideration for land or improvements or for construction of improvements at fair market value to any of the following governmental entities or persons:
>
> * * *
>
> (g) Any abutting private owner but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283[.]

The legislative history of RCW 47.12.063 and its companion RCW 47.12.283 reveals that the overarching purpose of the surplus property sale statute is to allow cost-effective sales while serving the public interest in a fair return. *See* H.B. Rep. on Engrossed S.B. 2365, 45th Leg., 1st Ex. Sess. (Wash. 1977); H.B. Rep. on Substitute S.B. 2957, 46th

Leg., 1st Ex. Sess. (Wash. 1979)[2]; *see also* RCW 47.12.063(2) ("the department may sell the property . . . *at fair market value* . . . to any of the following entities. . .") (emphasis added). Before these statutes, WSDOT was limited to selling surplus property to the public through auction. *Id.* The legislature's purposes also cited instances where WSDOT "was unable to dispose of surplus property in an equitable manner." H.B. Rep. on Substitute S.B. 2957, at 1, 46th Leg., 1st Ex. Sess. (Wash. 1979). Accordingly, the amendment identified public and private entities to whom WSDOT could sell surplus property. Proponents of the bill recognized it would be "permissive and will allow the sale of such land without requiring those noted above to participate in a public auction." H.B. Rep. on Engrossed S.B. 2365, at 1, 45th Leg., 1st Ex. Sess. (Wash. 1977).

III. STATEMENT OF THE CASE

In May 2004, Sustainable purchased two unconnected parcels on Airport Way South in Seattle. Abutting the property was a small (5,000+ square foot) alley owned in fee simple absolute by WSDOT. The WSDOT alley also abutted property owned by Staub, South Tacoma Way's predecessor. *See* CP at 356, 357, 413 (map and photos).

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[2] The precursors to current statutes were adopted in 1977 and 1979. Laws of 1977, Ex. Sess., ch. 151, §§47 and 48; Laws of 1977, Ex. Sess., ch. 189, §1. Accordingly, we examine the legislative history for those session laws.

Sustainable contacted WSDOT about acquiring the alley in 2004. CP at 346 (5/9/04 letter from J. Nabbefeld to WSDOT employee D. Van Dyk). WSDOT determined that the alley was surplus, appraised the property, and conveyed a deed to Sustainable for full market value on August 23, 2005. CP at 301-336 (Appraisal); CP at 350-354 (Quitclaim Deed). WSDOT complied with RCW 47.12.063(2)(g) except it thought Sustainable was the only abutting owner and thus did not notify Staub. CP at 595.[3] Sustainable was unaware that WSDOT failed to notify Staub or that WSDOT's sale procedures would normally include such notice. CP at 511-512; CP at 370 (N. Staub Dep. at 45:18-25).

As WSDOT was selling the alley, Staub was in the process of selling its property to South Tacoma Way, LLC. South Tacoma Way expressed concern that the Staub property would need earthquake retrofitting along the abutting alley, so it contacted WSDOT about purchasing the alley. *South Tacoma Way, L.L.C., v. State*, 146 Wn. App. 639, 644-5, ¶ 8, 191 P.3d 938 (2008). Nicholas Staub, however, was already aware of the sale: he had responded to emails from a Sustainable employee about the finalization of the sale on September 7th and 16th, 2005. CP at 435 (9/7/05 Scheiber/Staub email); CP at 514 (9/16/05 J. Schoenfeld/N. Staub email informing Staub that he could use alley until

[3] Another owner named Marshal also adjoined the property but registered no objection to the sale.

12/31/08); CP at 368 (N. Staub Dep. at 35:19-25; 36:1-25; 37:1-11); CP at 435. In early November 2005, WSDOT responded to an inquiry from South Tacoma Way and said the alley was already sold to Sustainable. 146 Wn. App. at ¶8; CP at 165; CP at 440. At that time South Tacoma Way's representative recognized the issue about WSDOT not giving notice to the Staubs. CP at 440; 146 Wn. App. at ¶8. Nicholas Staub admitted he researched the alley's sale, knew about the statutory notice issue, and intended to use this fact to terminate one of his leases early. CP at 364 (N. Staub Dep. at 19: 22-25; 20: 1-22); CP at 366 (N. Staub Dep. at 29: 6-8).

On January 17, 2006, WSDOT attempted to end the dispute by formally asking Staub, as an abutting landowner, to indicate no interest in buying. CP at 446. Staub emailed WSDOT on January 19, 2006 and expressed an interest in purchasing the alley. CP at 415. On February 1, 2006, WSDOT responded in writing stating it would not void the sale to Sustainable. CP at 448-49.

South Tacoma Way filed a declaratory judgment action on April 18, 2006, ten weeks after it purchased the Staub property. CP at 4. The complaint asked for a declaration that the sale to Sustainable was "ultra vires and void." CP at 7. The parties cross moved for summary judgment, which the court granted in favor of WSDOT and Sustainable. CP at 575-

77 (order); CP at 580-82 (letter opinion). The court ruled that even though WSDOT had not notified Staub of the sale per RCW 47.12.063(2)(g), WSDOT's actions were not ultra vires because WSDOT was authorized to sell surplus property at fair market value, confirming the sale did not thwart legislative intent, and the notice defect did not render the contract void. CP at 580-82. *South Tacoma Way,* 146 Wn. App. at ¶11. The Court also found that Sustainable was a *bona fide* purchaser entitled to rely on the conveyance. CP at 582. The trial court found no allegations of "fraud, or any violation of a public policy concern." CP at 582.

South Tacoma Way appealed and the Court of Appeals reversed, concluding that the sale to Sustainable was "ultra vires and void." 146 Wn. App. at ¶¶ 21-24. The court reasoned that "DOT did not have the authority to sell the alley to Sustainable without first notifying Frances [Staub] of the proposed sale." *Id.* at ¶ 24. It concluded this was an "ultra vires contract" that was "void and unenforceable." *Id.* at ¶ 24, n. 12. The Court concluded that because the sale was an ultra vires action, it could not consider equitable principles like estoppel, or Sustainable's argument that it was a *bona fide* purchaser. *Id.* at ¶27.

Sustainable petitioned for review.

IV. ARGUMENT

WSDOT agrees it must follow RCW 47.12.063(2)(g) when selling surplus real property to an abutting owner. This case asks what consequences and legal rights remain for an abutting owner when there is a mistake and WSDOT does not give advance written notice to that abutting owner. Because the property sold for appraised value and there is no fraud or misconduct by Sustainable or WSDOT, CP at 582, South Tacoma Way's argument depends entirely on WSDOT's failure to comply with the procedural requirement that WSDOT give abutting owners written notice of the opportunity to ask to purchase the property.

The Court of Appeals erred because it applied the ultra vires doctrine and concluded the deed was void. A century of case law shows that the deed was not ultra vires in the sense of a void act. WSDOT has jurisdiction and specific authority to sell surplus real property to an abutting owner. The Court should reject South Tacoma Way's primary argument that it is entitled to a declaratory judgment that the deed is void.

Determining that the sale is not ultra vires and void, however, does not end the analysis. In light of South Tacoma Way's arguments, the Court should also confront whether an abutting owner (or the owner's assignee) may bring an action to invalidate a sale based on WSDOT's failure to provide the notice required by RCW 47.12.063(2)(g) or whether

that claim is barred. South Tacoma Way did not bring its action in a reasonable time after its predecessor learned of the sale and the procedural mistake. Under these facts, the deed should not be rescinded.[4]

A. Standard of Review

All parties moved for summary judgment viewing the material facts as undisputed for purposes of their respective legal theories. CP at 489-509. Summary judgment is reviewed *de novo*, and this Court engages in the same inquiry as the trial court, reviewing the facts and reasonable inferences from those facts in the light most favorable to the non-moving party. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

B. The Deed To Sustainable Is Not Void Under The Ultra Vires Doctrine Because WSDOT Had Jurisdiction To Sell The Property And The Error Is Procedural

The Court of Appeals erred by concluding that the sale was "ultra vires and void." Opinion at ¶¶ 21, 24. The Court of Appeals did not properly distinguish actions that are absolutely ultra vires and therefore void, from actions following a procedural or lesser mistake, where a party may have some grounds to invalidate the government act, or

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[4] WSDOT assumes South Tacoma Way stands in the shoes of the abutting owner to argue that there should be a remedy for failure to provide the notice to an abutting owner in RCW 47.12.063(2)(g). There is no dispute, however, that South Tacoma Way has not claimed taxpayer standing for purposes of objecting to the performance of a public contract. *See Dick Enterprises Inc. v King County,* 83 Wn. App. 566, 569 fn. 3, 922 P.2d 184 (1996).

where the government may have a defense from enforcement. In other words, the court erred by failing to separate an act that is void *ab initio* from an act that may be voidable by a proper party with a timely suit. Case law shows that this deed is not void *ab initio* under the ultra vires doctrine because there is only a procedural mistake and the sale is otherwise within WSDOT's authority and jurisdiction.

1. WSDOT Had Jurisdiction To Sell The Property And This Case Involves Only A Procedural Mistake

In *Finch v. Mathews,* 74 Wn.2d 161, 443 P.2d 833 (1968), this Court discussed at length why the ultra vires doctrine does not compel the conclusion that government action is automatically void based on any departure from statutory authority. The Court held that "ultra vires and void" applied only to matters that are "wholly without legal authorization or in direct violation of existing statutes".

> This court has long recognized that in determining what acts of a governing body are ultra vires and void, and thus immune from the application of the doctrine of equitable estoppel, *it must distinguish those acts which are done wholly without legal authorization or in direct violation of existing statutes*, from those acts which are within the scope of the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner *or through unauthorized procedural means*.

Id. at 172 (emphasis added). *Finch* affirmed a lower court's decision quieting title in favor of private plaintiffs. The City of Seattle claimed that

the county had acted ultra vires when it alienated the parcel prior to annexation to the city. The Court concluded that the county's actions were within its general powers and the matter involved an "irregular and unauthorized procedure". *Id.* at 174.[5]

This view of the ultra vires doctrine and void acts is deeply rooted in Washington law. In *State v. Hewitt Land Comp.*, 74 Wash. 573, 134 P. 474 (1913), the Court adopted a rule that generally ensures a deed will be valid where there was jurisdiction to issue the deed, unless impeached for fraud:

> A purchaser of land sold by the state, or patented by the government has a right to presume that all proceedings leading up to the sale are regular. He is not bound to look beyond the face of the deed, either to find out whether the department has strictly complied with the law or rightly decided some fact, nor is he bound to investigate the conduct of the patentee or grantee. In other words, the patent or deed being in regular form, the law will not presume that it was obtained in fraud of the public right. 'The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud.' *Cornett v. Williams*, 20 Wall. 226, 22 L. Ed. 254.

74 Wash. at 586. The opinion emphasizes that the relevant legal question is whether the agency acted within its jurisdiction.

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[5] The Court also recognized that the county's actions were not malum in se, malum prohibitum, or against public policy, or even the product of bad faith, fraud, or collusion. *Id.* at 175. WSDOT does not dispute that such circumstances might lead to a void contract, or a voidable contract, but such facts do not exist in this case.

> It is *only where the department had no jurisdiction*, or the lands sold were never public property, or had been previously disposed of, or *no provision had been made for their sale, or they had been reserved, that the deed would be inoperative and void.*

74 Wash. at 587-88 (emphasis added).

South Tacoma Way cannot meet the standard for showing an absolutely ultra vires and void act. First, there is no question that WSDOT had jurisdiction to sell the land. RCW 47.12.063(2) applies only to land "under the jurisdiction" of WSDOT. Second, there is no claim of fraud or collusion or showing that the lands were reserved from sale by another law. WSDOT failed to follow a procedural step that might have led to a sale by auction. Accordingly, the case is controlled by *Finch* where this Court rejected the argument that the county's actions had been "ultra vires and void." 74 Wn.2d at 172.

To further illustrate why this is not ultra vires and void, the Court should consider how a mistake like failure to give notice is potentially cured or waived, or may lead to estoppel against the government. For example, if WSDOT failed to give notice but the abutting owners subsequently confirmed they had no objection, it would be absurd to treat the deed as void. For another example, if WSDOT itself attempted to rescind its deed months later, citing only its own procedural

mistake, *Finch* demonstrates that WSDOT would be estopped and the deed would not be void *ab initio*.

The Court of Appeals thus erred. There was no ultra vires act in the absolute sense where a governmental entity acted wholly without authority or jurisdiction.[6] Instead, this case involves an act that is squarely within the authority of WSDOT (a direct sale to an abutting owner) but the act was imperfect because there was no written notice to all abutting owners.[7]

2. The Court of Appeals Misapplied *Noel v. Cole* And Other Case Law

To reach its lynchpin conclusion that the sale was "ultra vires and void," the Court of Appeals misread *Finch* and *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982). *See* Opinion at ¶24, fn. 12. As shown above, *Finch* supports WSDOT. *Finch* distinguishes between absolutely ultra vires acts and an action with a procedural irregularity.

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[6] *See, e.g., Chemical Bank I and Chemical Bank v. WPPSS,* 102 Wn.2d 874, 911, 691 P.2d 524 (1984) (*Chemical Bank II*) (municipalities and PUDs have authority to purchase power but not substantive authority to enter into contracts that unconditionally guaranteed bond payments), *cert. denied,* 471 U.S. 1065 (1985); *Washington Educ. Ass'n v. Smith,* 96 Wn.2d 601, 603-04, 610, 638 P.2d 77 (1981) (statute did not permit director of office of fiscal management to deduct political contributions from state employee paychecks resulting in school districts not being bound by the contract).

[7] *See, e.g., Board of Regents of Univ. of Wash. v. Seattle,* 108 Wn.2d 545, 741 P.2d 11 (1987) ("an act of an officer which is within the authority, albeit imprudent or violative of statutory directive, is not *ultra vires*."); *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976) (acts performed wholly without authority by a corporation cannot be found liable, but acts done in violation of a statute or the rights of others can be); *Wendel v. Spokane County*, 27 Wash. 121, 124, 67 P.576 (1902) (same).

Noel v. Cole does not support the proposition that the deed for the alley was ultra vires and void. *Noel* involved an environmental group who obtained an injunction against the Department of Natural Resources and a timber buyer. The environmental group obtained the injunction by bringing a suit under the strict timelines for raising State Environmental Policy Act (SEPA) challenges and demonstrated that the timber sale contract should be enjoined.[8] On appeal, DNR and the timber buyer "conceded" the propriety of the SEPA ruling. *Id.* at 380 and n. 2.

There is only a limited analogy between *Noel* and this case. Yes, both cases involve third parties seeking to enjoin the State and a contracting party from performing a contract. But unlike *Noel,* the WSDOT and Sustainable *do not concede* that the deed is void or that it should be declared invalid. Instead, that is the issue presented by this case. When deciding whether RCW 47.12.063(2)(g) justifies a declaration of voidness, it is irrelevant that SEPA allowed a party in *Noel* to invalidate a timber sale contract. The interests of an abutting owner under RCW 47.12.063(2)(g) are entirely different from plaintiffs claiming a violation of SEPA procedures.

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[8] Depending on the procedures, a SEPA challenge to a state action like a timber sale will trigger short deadlines such as the 21 day period in RCW 43.21C.080(2)(a), or the short deadlines to appeal a permit under the Administrative Procedures Act. *See* RCW 34.05.542 (30 day deadline for judicial review of final agency order).

Read in context of the relevant law and facts of the case, *Noel* does not stand for the proposition that the timber sale contract was void *ab initio*. *Noel* simply held that the buyer could not seek "expectation damages" for DNR's failure to perform the timber contract. That conclusion follows from the fact that the timber sale was enjoined and invalidated; it required a conclusion that the sale was a null act.[9]

Moreover, *Noel* carefully precedes its discussion and use of ultra vires by *re-affirming* the distinction between an agency that "may simply lack any power" and an agency that "steps outside its authority by failure to comply with statutorily mandated procedures." *Id.* at 379. Thus, the best reading of *Noel* is that is reflects a timely lawsuit enjoining a timber sale for non-compliance with SEPA, not that any state contract with any procedural defect is void *ab initio*. *See generally Kramarvechy v. DSHS*, 122 Wn.2d 738, 763, 863 P.2d 535 (1993) (J. Madsen dissenting) (distinguishing between improper procedure and ultra vires).

Finally, *Noel* does not purport to overrule *Finch* or *Hewitt* and the longstanding rule that procedural irregularities do not render an act

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[9] The holding in *Noel* is also consistent with black letter contract law. 98 Wn.2d at 381 (". . . DNR was required to prepare an EIS. Since it did not do so, the contract of sale to Alpine was ultra vires and [the buyer] cannot recover for any alleged breach.") *Compare, e.g., Dudley v. Boise Cascade Corp.*, 76 Wn.2d 466, 471 (1969) ("In many cases a contractual duty will be discharged by operation of law in case the promised performance becomes physically impossible or legally forbidden.") (Quoting 2 Corbin, Contracts § 452, at 567 (1950)).

void. An ultra vires and void act applies to situations where an agency acts wholly without authority or jurisdiction, where an action directly contradicts the legislative purposes (such as a sale of land reserved from sale), or where an action is taken fraudulently. When a party claims a government act leading to a deed violated a procedural requirement, the proper legal question is whether the procedural error creates a remedy of invalidation. *See Peerless Food Products Inc. v. State,* 119 Wn.2d 584, 591, 596, 835 P.2d 1012 (1992) (disappointed bidder remedy limited to enjoining award of contract). *See* Part C, below.

3. An Overbroad Doctrine That Procedural Errors Result In Void Acts Is Contrary To Public Policy

The distinction between void *ab initio* and voidable is important for many reasons. For example, if a deed is void *ab initio*, the deed has no effect and title remains in the state. While such a conclusion is proper if the deed was outside an agency's jurisdiction or contrary to legislation, *see Hewitt Land Comp.,* the conclusion leads to absurdities when applied broadly to non-compliance with any statutory requirement.

For example, RCW 43.17.400 and RCW 47.12.050 require notice to municipalities before disposal of certain state lands. If land is conveyed by deed after imperfect compliance with RCW 43.17.400, is the deed simply void? Would the purchaser have to invoke cumbersome

claims of estoppel against the government to clear any clouds on title? The harsh rule of void *ab initio* has a place in the law, but it is balanced by the rule stated in *Finch* and *Hewitt* and the distinction of unauthorized procedural steps from wholly unauthorized actions.

C. The Court Should Deny South Tacoma Way A Remedy Of Rescission Or Invalidation

Even though South Tacoma Way is not entitled to a declaration that the deed is ultra vires and void, it argues in the same breath that the deed should be rescinded or invalidated. *See* Reply Br. at 4-5. To evaluate whether a remedy of rescission is allowed, this Court must examine whether the remedy complements the purposes of the statute or works against those purposes. *Peerless,* 119 Wn.2d at 591, 596-97.

1. The Purposes Of RCW 47.12.063(2)(g) Require Protection Of The Deed Unless An Unnotified Abutting Owner Acts Promptly

As shown by the legislative history above, the primary purpose of RCW 47.12.063(2) is to authorize cost-effective sales of surplus WSDOT land at fair market value for the benefit of the public. Within this larger purpose, there is a potential for selling at public auction because it *may* lead to a higher price for the public. Similarly, the public has an interest in avoiding the costs of a resale and avoiding liability from a rescission

where the buyer has improved the property and seeks an equitable remedy for its improvements as in *Noel v. Cole.*

The core purpose of the statute is to benefit the public, but a purchaser under the statute has secondary interests that correspond with the public interests. The purchaser seeks a valid deed; the public interest requires that state deeds be presumed valid. *In Re Foreclosure of Tax Liens,* 117 Wn.2d 77, 811 P.2d 945 (1991) (recognizing public policy requires protection of tax foreclosure deeds).

The statutory language confirms that an unnotified abutting owner, like Staub, has only a secondary and limited interest. An abutting owner has an interest in receiving notice, to which the person may respond in writing and thus trigger a public auction. This interest is transitory and ephemeral: a notified abutting owner gets *fifteen days* to respond in writing but otherwise is like a member of the general public if there is an auction. RCW 47.12.063(2)(g) (abutting owner must respond "within fifteen days of receiving notice"). Unlike other statutes, RCW 47.12.063(2) does not provide that a deed is void or voidable.[10]

[10] *Compare* RCW 80.12.030 (sale, lease, or assignment of public utility company property is void if made without commission approval); RCW 39.36.020 (government contracts made in violation of limitations on indebtedness statutes absolutely void); RCW 28B.20.382 (sale or long-term lease of university tract land "null and void" without legislative approval).

On the whole, a suit challenging a deed *prior to conveyance* would advance the legislative interest by properly triggering a public auction and allowing the unnotified person to bid. The primary purposes of the statute, however, are undermined if an unnotified abutting owner asks for rescission after WSDOT conveys a deed: the purchaser's interests are frustrated, the public faces additional transaction costs, and it undercuts the presumed validity of state deeds.

The problem, however, is that an unnotified abutting owner may have no practical opportunity to act *prior to* a deed. That problem could be met by a remedy where the unnotified abutting owner may seek an injunction prior to conveyance of the deed as in *Peerless,* or seek a rescission immediately when the lack of notice is discovered. Limiting the abutting owner to an immediate claim is particularly appropriate for RCW 47.12.063(2)(g) because a genuinely interested abutting owner has 15 days to act under the statute.[11]

If an unnotified abutting owner's remedy is limited to acting before the conveyance or promptly upon discovering the claim, it protects the statutory purposes. South Tacoma Way, however, cannot meet this test.

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[11] Sustainable's Petition provides the alternative argument that the bona fide purchaser doctrine should cut off the abutting owner entirely once the deed is executed. While there is significant support for Sustainable's position, this case should be resolved on its facts because South Tacoma Way's delayed lawsuit to invalidate or rescind the deed works against the statutory purposes.

WSDOT executed the deed on August 23, 2005. CP at 350-354. South Tacoma Way brought its claim on April 18, 2006. CP at 4. Both WSDOT and Sustainable made the Staubs aware of the sale in September 2005. CP at 435; CP at 514. South Tacoma Way and the Staubs were aware the sale had occurred without statutory notice in November and December, 2005. CP at 7-8; CP at 440. WSDOT provided a formal, albeit late, notice to Staub January 17, 2006, CP at 446, and unambiguously refused to rescind the deed on February 1, 2006. CP at 448-49.

The suit was not brought promptly after discovering the absence of notice and South Tacoma Way should be denied rescission or invalidation of the deed.[12]

V. CONCLUSION

The Court of Appeals should be reversed and the claim of South Tacoma Way should be dismissed.

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[12] The conclusion that South Tacoma Way's rescission claim must be limited to a prompt suit is consistent with general limits on the equitable remedy of rescission. *See Tyree v. Stone,* 62 Wn.2d 694, 697, 384 P.2d 626 (1963) ("The remedy [of rescission] must be pursued promptly and unconditionally."); *Bayley v. Lewis,* 39 Wn.2d 464, 469, 236 P.2d 350 (1952) ("Rescission must be prompt upon discovery of the facts warranting such action."); *Blake v. Merritt,* 101 Wash. 56, 59,171 P. 1013 (1918) ("The rule is that one who seeks to avoid a contract . . . must proceed with reasonable promptitude upon discovering the fraud, or the right to rescind will be waived.")

RESPECTFULLY SUBMITTED this 30th day of June, 2009.

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APPENDIX

RCW 47.12.063
Surplus real property program.

(1) It is the intent of the legislature to continue the department's policy giving priority consideration to abutting property owners in agricultural areas when disposing of property through its surplus property program under this section.

(2) Whenever the department determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for transportation purposes and that it is in the public interest to do so, the department may sell the property or exchange it in full or part consideration for land or improvements or for construction of improvements at fair market value to any of the following governmental entities or persons:

(a) Any other state agency;

(b) The city or county in which the property is situated;

(c) Any other municipal corporation;

(d) Regional transit authorities created under chapter 81.112 RCW;

(e) The former owner of the property from whom the state acquired title;

(f) In the case of residentially improved property, a tenant of the department who has resided thereon for not less than six months and who is not delinquent in paying rent to the state;

(g) Any abutting private owner but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale. If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283;

(h) To any person through the solicitation of written bids through public advertising in the manner prescribed by RCW 47.28.050;

(i) To any other owner of real property required for transportation purposes;

(j) In the case of property suitable for residential use, any nonprofit organization dedicated to providing affordable housing to very low-income, low-income, and moderate-income households as defined in RCW 43.63A.510 and is eligible to receive assistance through the Washington housing trust fund created in chapter 43.185 RCW; or

(k) A federally recognized Indian tribe within whose reservation boundary the property is located.

(3) Sales to purchasers may at the department's option be for cash, by real estate contract, or exchange of land or improvements. Transactions involving the construction of improvements must be conducted pursuant to chapter 47.28 RCW or Title 39 RCW, as applicable, and must comply with all other applicable laws and rules.

(4) Conveyances made pursuant to this section shall be by deed executed by the secretary of transportation and shall be duly acknowledged.

(5) Unless otherwise provided, all moneys received pursuant to the provisions of this section less any real estate broker commissions paid pursuant to RCW 47.12.320 shall be deposited in the motor vehicle fund.

[2006 c 17 § 2; 2002 c 255 § 1; 1999 c 210 § 1; 1993 c 461 § 11; 1988 c 135 § 1; 1983 c 3 § 125; 1977 ex.s. c 78 § 1.]

NOTES:

Finding -- 1993 c 461: See note following RCW 43.63A.510.

Proceeds from the sale of surplus real property for construction of second Tacoma Narrows bridge deposited in Tacoma Narrows toll bridge account: RCW 47.56.165.